No. 680

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

CORN PRODUCTS REFINING COMPANY, a corporation, and CORN PRODUCTS SALES COMPANY, a corporation,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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CASES CITED

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Corn Products Refining Company and Corn Products Sales Company, corporations, for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit respectfully shows:

Jurisdiction

This proceeding was instituted by petitioners in the Circuit Court of Appeals for the Seventh Circuit under the provisions of Section 45 of Title 15 of the United States Code to set aside an order of the Federal Trade Commission, dated March 16, 1942, ordering petitioners to cease and desist from certain practices claimed to be in violation of Sections 2 and 3 of the Clayton Act, as amended.

This petition seeks a review of the decree of the Circuit Court of Appeals for the Seventh Circuit dated September 18, 1944, which modified, affirmed and enforced the order of the Federal Trade Commission.

The jurisdiction of this court is invoked under Section 45(c) of Title 15 of the United States Code and under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. Code, Section 347).

Summary Statement

The Opinion of the Court Below

The opinion of the majority of the Circuit Court of Appeals is officially reported in 144 F. (2d) 211, and is printed in the record on pages 527-541. The separate opinion by Circuit Judge MAJOR, concurring in part and dissenting in part, is officially reported in 144 F. (2d) 221, and is printed in the record on pages 541-542.

Petitioners and Their Competitors

Petitioners are engaged in the manufacture, sale and distribution of products and by-products made from corn, including glucose (corn syrup), dextrose (refined corn sugar), starches and gluten feeds. Their principal plant is at Argo, Illinois, within the switching limits of Chicago, and they have other plants at Pekin, Illinois, North Kansas City, Missouri, and Edgewater, New Jersey* (R. 465). The issue in this proceeding concerns only the Chicago (Argo) and Kansas City plants.

Petitioners' competitors are located in Chicago, Granite City and Decatur, Illinois; Clinton and Keokuk, Iowa; Roby, Indiana; and St. Louis, Missouri (R. 466, 467).

* This plant has since been taken by the Government as a naval medical supply base and petitioners have moved their operations to a new plant at Ridgefield, New Jersey.

The Complaints of the Federal Trade Commission

On October 21, 1938, the Commission issued a complaint charging in general terms that petitioners were discriminating in price in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, so-called, approved June 13, 1936 (U. S. Code, Title 15, Section 13). Hearings were held at which counsel for the Commission, over objection, questioned officials of petitioners as to numerous matters not indicated by the complaint. Thereafter, the Commission filed an amended complaint which, in three counts, charged petitioners with violations of Sections 2(a), 2(e) and 3 of said Act. Further hearings were had, briefs were filed and the issues were argued orally before the Commission.

The Commission then rendered its decision, finding that petitioners had violated or were violating the Act in the respects hereafter described and ordering them to cease and desist from such violations.

Petitioners then instituted this action in the Circuit Court of Appeals for the Seventh Circuit to review and set aside the Commission's decision and order. That court, however, affirmed the Commission's action in most particulars; Circuit Judge MAJOR dissented. A rehearing was denied. Petitioners do not, of course, seek a review of one phase of the matter as to which the Circuit Court of Appeals held the Commission's order not justified.* No review is sought of the decision on the alleged violation of Section 3 of the Act (15 U. S. Code, Sec. 14).

The Facts and the Decisions Below With Respect to Alleged Violations of Section 2(a)

The Statute

The relevant portions of Section 2(a) of the Clayton Act, as amended in 1936 by the Robinson-Patman Act (15 U. S. Code, Sec. 13(a)), provides:

* With respect to prices for sales of glucose in containers smaller than tank cars.

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale, within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *."

So far as is here pertinent, the violations of this provision alleged and found to exist, and the facts and the decision thereon can best be considered under the following general headings:

Basing Point Prices,

Delayed Bookings and Deliveries,

Sales in Tank-Car Quantities to Tank-Wagon Customers,

Allowances and Discounts.

Basing Point Prices

1. *The Facts*

Petitioners' principal plant, which is at Argo in the Chicago switching limits, began operation in 1910 (R. 179). At that plant petitioners produced, among other things,

ucose or corn syrup unmixed which it sold in interstate mmerce (R. 195). Petitioners then determined the deered price of their glucose in tank carloads at any desnation by adding to the Chicago price the carload freight ite from Chicago to that destination (R. 197). In 1922, etitioners opened another plant in Kansas City, and have nce continued to use the same method of determining elivered prices at different destinations as theretofore, e., by adding to the Chicago base price the freight rate om Chicago to the particular destination whether the lucose is shipped from Kansas City or Chicago (R. 199).

All buyers at a given destination are charged the same rice regardless of point of shipment (R. 469-470). In hort, petitioners use what is commonly termed basing oint pricing, a method of pricing which has long been eneral in many industries.

Sales of glucose in carloads are customarily made nder contracts permitting purchasers to call for delivery t any time within thirty days from the date of the conract. Whether such delivery is made from the Chicago r Kansas City plant is entirely within petitioners' elecon, depending upon conditions at the two plants at the me (R. 195-197, 199).

Some of petitioners' customers are located at Chicago, llinois; Kansas City, St. Joseph and Springfield, Misouri; Ft. Smith, Arkansas; Hutchinson, Kansas; Lincoln, ebraska; Sioux City, Iowa; Waco, Sherman and San ntonio, Texas; Denver, Colorado; and Salt Lake City, tah (R. 195). With the exception of a few sales, shipents of which were made from the plants at Chicago, llinois, sales to purchasers located in the cities enumerated, ther than Chicago, were customarily fulfilled by shipments rom the plant at Kansas City, Missouri. Moreover, a subtantial number of the sales to purchasers located in Chiago were fulfilled by deliveries out of petitioners' storage anks in Chicago, to which glucose had been shipped by etitioners from both of their plants, while a few such ales were fulfilled by shipments to customers in Chicago irectly from the Kansas City plant (R. 196).

Many of the purchasers located at the designated points also purchased glucose from competitors of petitioners (R. 195-196).

No testimony was offered by the Commission as to the effect of petitioners' pricing method, which was in general use in the industry, and of the delivered prices produced thereby upon competition and upon petitioners' customers, but a stipulation was entered into between counsel for the Commission and counsel for petitioners which contains all there is in the record on this point. The pertinent portions of this stipulation are as follows:

> "That purchasers located in the cities enumerated above are candy manufacturers who purchase glucose or corn syrup unmixed of like grade and quality for use in the manufacture of candy and are competitively engaged in the sale of such candy to various customers, including chain stores, wholesalers and retailers, located in the various states of the United States. Such glucose or corn syrup unmixed is used as an ingredient to some extent in the manufacture of most kinds of candy and is one of the major raw materials used in the production of many varieties, constituting from five to ninety per cent. of the finished weight thereof. Generally the syrup is used in greatest proportion in candies which are sold by such candy manufacturers at above a few cents per pound and at narrow margins of profit. The higher prices paid for such syrup by such candy manufacturers located in the cities enumerated other than Chicago, Illinois, result to a greater or lesser degree in higher material costs than those of manufacturers in Chicago, the degree in each instance depending upon the difference in price and the proportion of syrup used in the particular candy manufactured. As to candies priced at but a few cents per pound and bearing no differentiating name or brand, candy manufacturers may attract customers by selling such candies at only a small fraction of a cent per pound lower than a competitor. This is especially true in selling such candies to chain stores and other purchasers of large quantities, to whom such a small difference is determinative in placing their business.

Under such circumstances, candy manufacturers paying the higher prices for such syrup than competitors may attempt to recover such increased costs by increasing the price of such candies or make only selected sales on a non-price or other basis. Unless other cost factors are present, the result in either case is to reduce profit *pro tanto*. This result may occur either directly through the absorption of higher syrup costs in the sale of candies at competitive prices or indirectly through a reduced volume of sales, or the result may be to diminish the ability of those paying the higher prices for syrup to compete with those paying the lower prices. These results may be avoided or augmented by differences in the costs to such candy manufacturers of such other factors as labor, taxes, rents, insurance, other ingredients, proximity to markets and delivery of the finished candies no matter how such differences are brought about." (R. 198-99)

There was no stipulation or proof that any candy manufacturers had knowledge that they were receiving the benefit of any discrimination in price.

Some of the candy manufacturers were located at the cities enumerated before the construction and operation of petitioners' Kansas City plant, and some candy manufacturers formerly located at said cities have, since 1922, relocated in Chicago (R. 199).

2. *The Decisions Below*

The Commission found that price discrimination in violation of Section 2(a) has occurred whenever petitioners, having sold at a delivered price made up of the Chicago base price plus freight from Chicago to a buyer's destination, have made delivery from petitioners' Kansas City plant and the freight rate from Kansas City has been less than from Chicago.

The court below upheld the Commission's decision, rejecting petitioners' contentions that:

1. Both the language and the legislative history of the Robinson-Patman amendment made it clear that the price discrimination intended to be prohibited

thereby did not embrace differences in delivered prices at different destinations resulting from the basing point method.

2. On the facts here, where contracts are made for delivery thirty days thereafter, where petitioners have two plants and do not know in advance from which plant shipment may be made, no discrimination in price results from contracting for a delivered price, the freight factor of which may later prove to be different from the actual freight.

3. Much more serious discrimination between customers at the same destination would result from charging them different prices dependent upon the plant from which shipment happened to be made.

4. The stipulation did not warrant a finding of reasonable probability that the charging of "Chicago plus" delivered prices would, where deliveries were made from the Kansas City plant, have the effect upon competition described in Section 2(a) and essential to a finding of a violation thereof.

5. There was no finding and no evidence that any customer "knowingly receives" the benefit of the alleged discrimination, and without such a finding no decision could properly be made that Section 2(a) was violated.

6. For these reasons, the decision and order of the Commission were contrary to law and arbitrary.

On the same day that the Circuit Court of Appeals handed down its decision in this action, it rendered a decision in a companion case involving the A. E. Staley Manufacturing Company, one of petitioners' principal competitors, *A. E. Staley Mfg Co.* v. *Federal Trade Commission*, 144 F. (2d) 221. It there held, with Judge Major dissenting, that the basing point pricing system violated Section 2(a) but that since the system was in general use in the industry, the Staley Company was justified in making its delivered prices by the basing point method in order to meet competition.

It therefore directed that the Commission's cease and desist order in that case be vacated and its complaint be dismissed. In that case, the facts were much less favorable to the manufacturer, since the Staley Company has only one plant and that plant is not at Chicago, the basing point.

The Solicitor General has recently filed a petition for certiorari in the *Staley* case alleging that the questions presented in that case are of general importance and of concern to members of industry and to the Federal Trade Commission, all reasons equally applicable here. The instant case presents the basing point price issue more clearly than the *Staley* case, which involves chiefly the issue of meeting competition under Section 2(b) of the Act.

Delayed Bookings and Deliveries

1. *The Facts*

In the case of price advances, it has been petitioners' practice to accept orders for glucose at the old or lower prices for a period of usually five and occasionally ten days after announcement of price increases (R. 203). To receive the benefit of the old price, the purchaser must ordinarily call for or take delivery of the glucose thus ordered within thirty days from the date of the advance (R. 205). Petitioners endeavor not to accept orders for more than a purchaser's normal requirements for thirty days, these being determined as nearly as possible by petitioners' executives based upon the customer's past purchases from petitioners and petitioners' knowledge of the customer's business (R. 229). In certain instances, however, petitioners (1) have allowed customers to book at the old prices after the expiration of more than five days from the announcement of price increases (R. 219-220, 227), and (2) have extended the time within which withdrawals could be made by customers against orders so as to permit deliveries to be made to customers at the old prices more than thirty days after the announcement of price changes (R. 221).

The uncontradicted testimony of the witnesses called by both sides was that these things were done by petitioners to meet competition (R. 220-221, 227, 256, 324, 328-329, 348, 365), but the Commission made no findings to this effect (R. 472, 473). No evidence whatever was produced as to the effect of these practices upon competition either with petitioners or with their customers.

2. *The Decisions Below*

The Commission found that the practices described constituted price discrimination within the prohibition of Section 2(a). It did this despite the fact that there was no proof whatever as to the effects of these practices upon competition. The Commission, in order to support a finding of a violation, treated the stipulation entered into solely with regard to the basing point question as a stipulation of facts regarding the effect upon competition of delayed bookings and deliveries. It failed to find, in accordance with the uncontradicted testimony, that these practices were resorted to to meet competition.

The Circuit Court of Appeals upheld the Commission's decision and rejected petitioners' contentions that:

1. Extensions of time for booking orders or for taking delivery were matters of the terms and conditions of contracts of sale and not of price and therefore did not come within the application of Section 2(a).

2. There could be no finding of a violation of Section 2(a) in view of the complete absence of any proof or stipulation as to the effect of these practices upon competition, and that the failure of the Commission so to find was arbitrary.

3. The Commission erred and its decision was arbitrary in failing to give effect to the uncontradicted evidence that petitioners did these things only to meet the competition of similar practices by its competitors.

Sale of Tank-Car Quantities to Tank-Wagon Customers

1. *The Facts*

At various times petitioners have booked orders for and sold tank-car quantities to customers in the Chicago area who ordinarily purchase only in small tank-wagon quantities, and have no facilities for unloading tank cars. Delivery has been made to them by tank wagon from petitioners' storage facilities. In all such instances, however, they have been charged the higher tank-wagon prices (R. 254, 255, 285, 286, 288). The privilege has been offered to all tank-wagon customers in the Chicago area (R. 328, 365). Petitioners have done these things to meet similar action of competitors (R. 256, 324, 329, 348). There was no proof or stipulation as to the effect of this practice on competition.

2. *The Decisions Below*

The Commission found that these acts constituted price discrimination in violation of Section 2(a) and ordered petitioners to cease and desist therefrom.

The Circuit Court of Appeals upheld the Commission's decision and rejected petitioners' contentions that:

1. Since these tank-wagon buyers paid the tank-wagon prices, there was no discrimination in price.

2. Since the privilege was offered to all tank-wagon buyers, there was no discrimination.

3. In the complete absence of proof or stipulation as to the effect of the practice on competition, there could be no finding of a violation of Section 2(a).

4. The uncontradicted evidence required a finding that the practice was justified because indulged in for the purpose of meeting competition.

5. The failure of the Commission so to decide was arbitrary.

Allowances and Discounts

1. *The Facts*

As a by-product of their corn refining, petitioners produce gluten feed and meal in the amount of more than 250,000 tons annually, which is approximately 40 to 50 per cent of all such products used in the United States. Petitioners sell and ship such products to approximately 3,000 different purchasers located in different states. Such feed and meal compete with similar products produced and sold by petitioners' competitors in the corn refining industry and with other types of feed produced by distillers, cottonseed mills, wheat flour mills, and soya bean crushers. Under contracts or oral arrangements with certain purchasers who buy these products in very large quantities, petitioners have granted to them discounts or allowances below petitioners' quoted market prices amounting to 50 cents and, in some cases, 65 cents per ton (R. 108, 114, 117).

No testimony was offered as to the effect, if any, of these practices upon competition. All that there is in the record on this point is a stipulation entered into by the parties (R. 186-191). It was stipulated that the dealers to whom the allowances were granted were in competition with other dealers to whom petitioners also sold, both in the sale of prepared mixed or branded feed products and in the resale of feed and meal products unmixed, and that the allowances granted the favored customers would be sufficient *"if and when"* reflected in whole or in substantial part in resale prices to attract business to the favored customers away from his competitors or to force such competitors to resell feed and meal products at a substantially reduced profit or to refrain from reselling. It was not stipulated, however, and there was no proof that the allowances ever were reflected by the customers in their prices.

It was also stipulated that in the period since June 19, 1936, petitioners sold substantial quantities of certain brands of starch to Keever Starch Company and Stein-Hall

Company and that commissions or allowances from petitioners' prices were made to these concerns, while at the same time substantial quantities of these commodities were sold at current market prices without allowances to other concerns competitively engaged with Keever and Stein-Hall. There is no contention that these discounts or allowances were justified by savings in the cost of manufacture, sale or delivery resulting from the different methods in which the starch was sold to these concerns as compared with its sale to other buyers. It was stipulated that the allowances granted by petitioners to Keever and Stein-Hall were sufficient *"if and when"* reflected in whole or in substantial part in retail prices to attract business to them and away from their competitors or to force such competitors to resell such products at substantially reduced profit or to refrain from reselling. Here, again, there was no proof that the discounts ever were so reflected or ever had the results described (R. 191-193).

2. *The Decisions Below*

The Commission found that all of these practices violated Section 2(a) and ordered petitioners to cease and desist therefrom.

This decision was upheld by the Circuit Court of Appeals, which rejected petitioners' contentions that:

1. On the basis of the stipulations and in the complete absence of any proof that the discounts or allowances were ever reflected in the prices charged or that they affected the competitive situation in any way, no finding of a violation of Section 2(a) was possible.

2. Therefore, the decision of the Commission was arbitrary.

The Facts and the Decisions Below With Respect to the Alleged Violation of Section 2(e)

The Statute

Section 2(e) as amended by the Robinson-Patman Act provides:

> "That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, withor without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

The Facts

Prior to 1936, dextrose (refined corn sugar) although known to physicians and technical experts, was a new product to the housewife, the baker and the confectionery industry (R. 174). Although petitioners had been manufacturing and selling dextrose before 1936, approximately 80 per cent of their sales were to the baking industry. Petitioners desired to expand the field of dextrose and stimulate its use by other industries (R. 175). The manufacturing processes of candy makers had been developed on the basis of using other ingredients than dextrose and a great deal of research was necessary before they would change their formulæ to include the use of dextrose (R. 175). In these circumstances, the officials of petitioners conceived the idea of finding a candy manufacturer, selling and advertising on a national scale, who could be persuaded to use dextrose and then to publicize, through his advertising and sales media, the use of dextrose as an ingredient in his candies. Two preliminary experiments in this direction were made in a small way with the Bachman Chocolate Manufacturing Company of Mt. Joy, Pa. and with the Lewis Candy Company in New England, but these did not prove successful

because these companies did not have adequate distribution (R. 61, 62, 180, 181). Then petitioners approached the Mars Candy Company on the proposition, but it was unwilling to undertake the experiment (R. 62). In 1935 or 1936 petitioners entered into negotiations with the Curtiss Candy Company for the purpose of inducing that company to use dry dextrose in its candies and to advertise them as containing dextrose. Curtiss had as wide a distribution of its candies as any candy manufacturer in the United States, was as aggressive as any other company in the business, and its national advertising over a period of ten years was almost equal to that of all the others in the field (R. 300, 301). Before Curtiss would enter into any arrangement it experimented for approximately a year with the help of petitioners to ascertain whether dextrose could be used satisfactorily in its candies (R. 175). In September 1936, Curtiss and petitioners reached an understanding for the arrangement here involved.[9] The substance and essential features of the arrangement were as follows:

(1) The arrangement was not a part of any contract or agreement by Curtiss to purchase dextrose or corn syrup from petitioners and contained no condition requiring such purchase. Curtiss did agree to use in its candies a sufficient quantity of dextrose so that the candies might legitimately be advertised as "rich in dextrose" but Curtiss was left free to purchase dextrose from any suppliers and there were other companies than petitioners which produced and sold dextrose (R. 296, 297, 318).

(2) Curtiss agreed to show the words "rich in dextrose" on all of its wrappers and other containers, in its display advertising and upon the uniforms of its peddlers. This was done by Curtiss at very substantial expense to it (R. 174, 179, 302, 303, 317).

(3) Curtiss agreed to and did place its national radio and magazine advertising through petitioners' advertising agency, and advertisements were worked

up in which Curtiss advertised their candies as "rich in dextrose" while petitioners advertised the use of dextrose as an ingredient in Curtiss candies (R. 59, 178, 297, 299).

(4) Petitioners paid no money in any way to Curtiss. Each party paid the advertising agency for the radio and magazine advertisements placed for it by the agency. Petitioners' expenditures for their own advertising of their dextrose under the arrangement amounted to $100,000 in 1936, $250,000 in 1937, and $200,000 in 1938 and 1939 respectively (R. 297). The total advertising expenditures of Curtiss for advertising its candies stood in the ratio of at least two to one to those of petitioners (R. 177). However, neither party was under any obligation to spend any definite amount or any amount at all for its advertising (R. 61, 318).

Although not obligated by the arrangement to purchase any dextrose from petitioners, Curtiss, since the arrangement was entered into, had increased its purchases of both corn syrup and dry dextrose from petitioners (R. 291, 292). This was not pursuant to any understanding relating to the advertising arrangement (R. 293, 294).

The Curtiss Candy Company is engaged in the manufacture and sale of candies (R. 292). It is not engaged in the sale of dextrose. The dextrose and corn syrup which it purchased from petitioners was purchased by it for use as an ingredient in its candies and not for resale by it as dextrose or corn syrup (R. 293).

Petitioners have offered an arrangement similar to that with Curtiss Candy to others, and petitioners' vice-president testified that petitioners are ready at any time to enter into similar arrangements on a proportional basis with any other candy manufacturer who is willing to use sufficient dextrose in his candy to advertise it as "rich in dextrose", is willing to advertise the dextrose content as a

feature of his candies, changing his wrappers and other advertising media for the purpose and whose distribution and national advertising are substantial (R. 179-180).

The Decisions Below

The Commission found that this arrangement constituted a violation of Section 2(e) and ordered petitioners to cease and desist therefrom.

The Circuit Court of Appeals upheld this decision, rejecting petitioners' contentions that:

1. Since dextrose was purchased by Curtiss for and used only as an ingredient in its candies and completely lost its identity, the transaction did not have to do with the sale of a commodity "bought for resale, with or without processing" and Section 2(e) was not applicable.

2. Since it was no part of the arrangement with Curtiss that it should purchase dextrose from petitioners, the transaction was not with Curtiss as a "purchaser" and hence Section 2(e) was inapplicable.

3. There was no proof to support a finding of discrimination since there was no evidence of any other candy manufacturer who had similar advertising; there was no proof of any candy manufacturer who wanted to enter into a similar arrangement or had been refused by petitioners, and petitioners' witnesses testified without contradiction that petitioners were willing to make similar arrangements with other candy manufacturers with similar nationwide advertising and methods of distribution.

4. Such arrangement between petitioners and Curtiss did not constitute a service or facility within the meaning of Section 2(e).

The Questions Presented and the Reasons for Review by This Court

I. Questions under Section 2(a) of the Clayton Act, as amended, with regard to the basing point system and petitioners' pricing practices.

A. Questions

1. Do such differences in delivered prices at different destinations as result from the basing point method constitute discrimination in price within the prohibition of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, so-called, approved June 13, 1936 (U. S. Code, Title 15, Section 13)?

2. Where a company has several plants, one of them at a base point, and it contracts in advance for sales, not knowing from which plant shipment will be made, is it unlawful for it to contract for a delivered price arrived at on the basis of the freight rate from the base point, if it thereafter becomes necessary or it elects to ship from the other plant and if the freight from the latter to the customer's destination is lower than that from the basing point?

3. So long as all customers at a given destination are charged the same price under contracts for advance sales, regardless of the manufacturer's election as to the plant from which shipment may ultimately be made, is Section 2(a) of the Clayton Act violated because the delivered price is arrived at by the basing point method in the event shipment is ultimately made from a plant from which the freight rate is less than that from the base point?

4. Is the language of Section 2(a) of the Clayton Act concerning the effects which price discrimination must have upon competition to establish a violation, to be given a different meaning from that placed by this court upon similar language in Sections 3 and 7 of the same act?

5. In the complete absence of proof of any knowledge on the part of petitioners' customers that they were receiving the benefit of alleged discrimination, can there properly be a finding that Section 2(a) is violated?

6. Where the parties stipulate the ultimate facts as to the effect of pricing practices on competition, may the Commission and the court infer other facts?

7. Were the decision and order of the Commission in accordance with the law and supported by substantial evidence?

B. Reasons for Review

In its effect on many of this country's principal industries, the present case is one of the most important commercial cases to come to the attention of this court in many years. We state this since the basing point method of pricing is and for many years has been in use in many important industries of the country. It was employed in industries the lawfulness of whose practices under the anti-trust laws has been before this court, and it has not been condemned; *Maple Flooring Manufacturers Association* v. *United States*, 268 U. S. 563 (1925); *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588 (1925). In the latter case this court referred to the benefit of the basing point pricing method in avoiding monopoly and preserving and promoting competition. If delivered prices produced thereby are now unlawful, there will have to be radical changes in the methods of business of many companies.

Before the amendment of Section 2 of the Clayton Act in 1936 by the Robinson-Patman Act, it was never held that differences in delivered prices resulting from the basing point method were unlawful thereunder. The decisions below purport to rest upon the language of Section 2(a) as it was amended by the Robinson-Patman Act. Even since the enactment of that Act, however, until the

decisions of the court below in this case and in the *Staley* case, referred to on page 8, it has never been held that the amendment outlawed delivered prices resulting from the basing point method.

Hence the decision of the court below confronts petitioners and many industries for the first time with the suggestion that the basing point pricing method long used by them is now unlawful. The importance of the matter calls for review of the decision by this court.

Such a review is the more necessary and important in view of the fact, which will be shown more fully in brief and argument, that the legislative history of the Robinson-Patman Act and the Congressional debates on the bills make it clear that it was not the intention of Congress thereby to outlaw basing point prices. Moreover, various attempts to obtain Congressional approval of bills which would prohibit basing point prices have failed, clearly confirming the Congressional intention that basing point prices are not unlawful.

A decision of the Commission and of a Circuit Court of Appeals which gives to a statute an interpretation and effect so plainly contrary to the will of Congress should be reviewed by this court.

Even if it should, nevertheless, be held that differences in delivered prices produced by the basing point method constitute discrimination in price within the prohibition of Section 2(a), there are other questions affecting the interpretation, application and administration of that section which call for authoritative ruling by this court.

Thus the decisions of the Commission and of the court below as to the nature of the proof of the effect of price discrimination which must exist to constitute a violation appear in conflict with decisions of this court and of the circuit courts of other jurisdictions interpreting and applying similar language in Sections 3 and 7 of the same statute.

> *International Shoe Co.* v. *F. T. C.*, 280 U. S. 291 (1930), at p. 298;

Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U. S. 346 (1922), pp. 356-357;

A. E. Staley Mfg. Co. v. *Federal Trade Commission*, 135 F. (2d) 453 (C. C. A. 7th, May 10, 1943);

Standard Oil Co. v. *F. T. C.*, 282 Fed. 81 (C. C. A. 3rd, 1922), pp. 86-87;

Pennsylvania Railroad Co. v. *I. C. C.*, 66 F. (2d) 37 (C. C. A. 3rd, 1933);

Temple Anthracite Coal Co. v. *F. T. C.*, 51 F. (2d) 656 (C. C. A. 3rd, 1931);

Vivaudou, Inc. v. *F. T. C.*, 54 F. (2d) 273 (C. C. A. 2nd, 1931);

United States v. *Republic Steel Corporation*, 11 F. Supp. 117 (D. C., N. D. Ohio, 1935).

The confusion thus created calls for clarification.

Furthermore, it is important for industries to know whether, ~~as the~~ statute says, knowledge on the part of a customer that he is receiving the benefit of an alleged price discrimination is an essential part of a violation, and whether such knowledge must be proved by evidence, or whether it may be inferred by the Commission from its own imagination without evidence.

II. Questions under Section 2(a) with regard to other practices found unlawful by the Commission and reasons for a review of the decision below with reference thereto.

A. Questions

1. Did petitioners' action in extending the time within which buyers could book orders at old prices and the time for calling for delivery on the occasion of price changes beyond the period generally allowed constitute price discrimination within the prohibition of Section 2(a)?

2. Did the sale of glucose in tank-car quantities to buyers customarily buying in tank-wagon lots constitute un-

lawful discrimination in violation of Section 2(a) under the circumstances shown?

3. Could the Commission properly find a violation of Section 2(a) in the complete absence of any proof as to the effect of the practices in question upon competition?

4. Could the Commission properly find a violation of Section 2(a) by reason of the discounts or allowances, on the basis of a stipulation that these allowances might affect competition if reflected in the customers' prices, when there was no evidence that they ever were so reflected?

5. Did the Commission act arbitrarily and in disregard of the evidence or lack of evidence?

B. Reasons for Review

For the public as a whole, it is important that there be a controlling decision on the effect and application of Section 2(a) of the Clayton Act in these respects, for many business practices are dependent thereon. And so far there has been no such controlling decision.

III. Questions under Section 2(e) and reasons for a review of the decisions below with reference thereto.

A. Questions

1. Is a commodity purchased by a manufacturer solely for use as an inseparable ingredient in another article "a commodity bought for resale, with or without processing"?

2. In view of the fact that the advertising arrangement with Curtiss contained no obligation on Curtiss to purchase dextrose or other commodities from petitioners, was the arrangement one with Curtiss as a "purchaser" within the application of Section 2(e)?

3. Was there substantial evidence to support the decision or did the Commission act arbitrarily?

B. Reasons for Review

Apart from the injustice to petitioners, if the decision was arbitrary and without support in the evidence and if the decision was the result of an erroneous interpretation of Section 2(e), there is the question as to what is meant by the term "a commodity bought for resale, with or without processing", which must be of concern to many business enterprises. The decision below is so broad that this phase of it would apply to most manufacturing processes. This is a question which has not been before this court and as to which no controlling precedent yet exists.

Wherefore your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court to the Circuit Court of Appeals for the Seventh Circuit commanding that court to certify and send to this court for its review and determination a full and complete transcript of the record and that the decision of said Circuit Court of Appeals be reversed in so far as it upheld the order of the respondent, and that petitioners have such other and further relief as may be just.

Dated, New York, N. Y.,
November 14th, 1944.

Corn Products Refining Company,
Corn Products Sales Company,

By George deForest Lord,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I.

The Court below erred in holding that differences in delivered prices resulting from the basing point method constitute discrimination within the prohibition of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The question is of sufficient importance not only to petitioners, but also to industry generally to merit review of the decision.

A. The Importance of the Basing Point Question.

This case brings to this Court for the first time the question of the lawfulness under the Clayton Act in its present form of basing point delivered prices.

The Federal Trade Commission is not in a position to deny that this question is of importance, for in its petition for a writ of certiorari in the *Staley* case it stated at page 9:

> "This case and *Corn Products Refining Co.* v. *Federal Trade Commission*, which was decided by the court below on the same day and which also involves the validity under Section 2 of the Clayton Act of the delivered price system in effect in the glucose industry, are the first judicial decisions dealing with the application of Section 2, as amended by the Robinson-Patman Act, to sales under a delivered price basing-point system. It is of grave concern to the Federal Trade Commission in its administration of Section 2, as well as of concern to the members of industry, that the questions raised in this case, which led to three opinions in the court below, should be set at rest by decision in this Court."

For years there has prevailed in the corn processing industry, as in various other industries, the practice of

determining delivered prices at different destinations by adding to a base price the freight rates from the basing point, so-called, to the buyers' localities. In the corn processing industry, the basing point has been Chicago, where petitioners have their principal plant, established in 1910. In 1922, they opened another plant at Kansas City. They have continued to determine their delivered prices as before by adding to the Chicago base price the freight rate from Chicago to the destination of each buyer. The Federal Trade Commission has found that discrimination in price in violation of Section 2(a) of the Clayton Act, as it was amended in 1936 by the so-called Robinson-Patman Act, occurs whenever shipment is made from Kansas City and the freight rate from Kansas City to a buyer's destination happens to be less than the freight rate from Chicago, despite the fact that the contracts allow buyers thirty days within which to take delivery and at the time the sales are concluded it cannot be determined from which plant delivery will have to be made. This decision has been upheld by the Circuit Court of Appeals for the Seventh Circuit.

If this decision stands, it will affect the pricing methods not only of petitioners but of numerous industries. This court is, of course, familiar with the extended discussion and writings with regard to the Pittsburgh-plus prices in the steel industry. In at least two cases that have been before this court the industries involved have employed the basing point method. *Maple Flooring Manufacturers Association* v. *United States*, 268 U. S. 563 (1925); *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588 (1925). The Federal Trade Commission has recently made a decision in regard to the cement industry, holding the basing point price method in that industry discriminatory in violation of Section 2(a), and proceedings to review that decision are pending in the Circuit Court of Appeals for the Seventh Circuit.

Hence, this case squarely raises for review by this court a question as to the effect of the Clayton Act upon pricing practices which is of general concern.

B. If Basing Point Prices Have Now Been Made Unlawful, This Represents a Radical Change in the Law, Which Should Not Be Given Effect Without Examination of the Pertinent Statutes by This Court.

Despite the general use of the basing point pricing method and the numerous discussions thereof, it has never been held by any court that either the method or the prices resulting therefrom were unlawful. This court did not condemn them in the two cases previously cited. It is only by reason of the amendment of Section 2(a) of the Clayton Act in 1936 that it is now contended by the Federal Trade Commission that differences in prices resulting from the basing point method have become unlawful. The decisions both of the Commission and of the court below rest upon this amendment of the statute.

The statute, as amended, does not, however, expressly prohibit differences in prices produced by the basing point method. Neither does it declare that the basing point method is itself unlawful. Consequently, the decisions below rest upon an interpretation of the language used by Congress. We submit that an interpretation, which would give this language the effect of prohibiting a long-standing practice, should not be permitted to stand without review by this court.

There is the more reason for this contention in view of the legislative history of the Robinson-Patman amendment.

C. The Decisions Below Give to Section 2(a) an Effect so in Conflict with the Intention of Congress That They Should Be Reviewed by This Court.

Section 2(a), as amended by the Robinson-Patman Act, does not define discrimination in price. Obviously, it was not intended by Congress when it prohibited discrimination in price to require that all goods should be sold at uniform prices thoughout the country. It becomes necessary and ap-

propriate, therefore, to examine the legislative history and the Congressional debates to see what light they shed upon the question whether Congress, when it prohibited discrimination in price, meant to make it unlawful for an industry to sell at different prices at different destinations, the differences being determined by the basing point method. The discussions in Congress upon the bills which became the Robinson-Patman amendment make it amply clear not only that Congress did not intend to make unlawful the basing-point price method and the differences in prices resulting therefrom, but that it was only upon the assurance that the amendment would not have this result that the managers of the bill secured its passage.

The following colloquy which took place during the debate in the Senate, indicates that it was regarded, when the bill was considered, that the prohibition against selling on delivered prices computed by the basing-point method had been eliminated and that the Robinson-Patman Act as passed would not prohibit the basing-point method:

> "Mr. Davis. Mr. President, if I may have the attention of the Senator from Idaho, I should like to ask him whether this proposed legislation changes in any way the present status of the basing-point plan now used by steel and cement and other natural-resource industries.
>
> Mr. Borah. I could not answer offhand, because I am not sure that I know the exact operation of the basing-point plan in the steel industry.
>
> Mr. Davis. Under the basing-point plan in the steel industry the markets all over the country are available for anyone who is engaged in that industry.
>
> Mr. Borah. My opinion would be that this does not have any effect upon that. I defer to the judgment of the Senator in charge of the bill, but that would be my impression.
>
> Mr. Van Nuys. The Senator from Idaho is correct." (80 Congressional Record, p. 9903)

Moreover, we have not only the benefit of these statements but we have the fact that a provision originally in-

serted in the bill which would definitely have prohibited delivered prices resulting from the basing point method was stricken from the bill in order to make it plain that the basing point prices were not affected and that the elimination of this provision was deemed necessary by the committees in charge in order to secure the passage of the bill.

The provision which was stricken from the bill was as follows:

> "(5) That the word, 'price' as used in section 2 shall be construed to mean the amount received by the vendor after deducting freight or other transportation, if any, allowed for defrayed by the vendor."

The following excerpts from the Congressional Record show it was believed that the bill would not pass unless this clause was eliminated:

> "Mr. Miller: * * * The next amendment that will be offered by the committee as a committee amendment will be directed at subsection (5) on page 7, which is the basing point provision in the bill.
>
> Mr. Rich: Does the gentleman mean to strike out the whole section?
>
> Mr. Miller: That amendment will be for the purpose of striking out all of subsection (5), or the basing point provision in the bill. Probably that provision should not have been put in a bill amending the Clayton Act; but it was put in and the committee has decided to offer an amendment to take it out." (80 Congressional Record, p. 8106)
>
> "Mr. McLaughlin: The fact is, however, that in the letter to which the gentleman has referred from the farm organizations they object to the basing-point system and object to the classification, both of which have been stricken from the bill." (80 Congressional Record, p. 8107)
>
> "Mr. Patman: * * * Farmers' organizations sent letters to all the Members saying they were opposed to certain things; I learned through their rep-

resentatives in Washington 2 or 3 weeks ago they were opposed to the basing-point provision of the bill, section 5. So I took it up with the Judiciary Committee. The committee members had heard similar complaints and the committee at a meeting agreed to cut out the basing-point provision. This silenced a lot of the opposition. The basing point is not directly related to what we are trying to do, as I view it, so it was all right to cut that out." (80 Congressional Record, p. 8113)

"Mr. Boileau: * * * Another objection raised by these farm leaders was with respect to the anti-basing-point provision. They felt that this was a dangerous feature of the bill. I personally would rather have that anti-basing-point provision in the bill, but the committee, in its wisdom, will submit a committee amendment striking it out. The members of the steering committee believe that in order to insure its enactment we should eliminate this provision, and, although personally I would prefer that it remain in the bill, I am nevertheless willing to go along. I am pleased that in this respect we are meeting the demands of the farm organizations with whom I have always tried to cooperate, both as a member of the Committee on Agriculture and as a Member of the House, and whose views I have welcomed at all times in the consideration of this bill." (80 Congressional Record, p. 8122)

"Mr. Robsion of Kentucky: * * * There were two features, however, on which we were not in full agreement. Many of us opposed section 5, on page 7, of this bill. It is the so-called price-fixing or basing-point provision. It has been unanimously agreed that that section go out; * * *." (80 Congressional Record, p. 8130)

"Mr. Miller: * * * The second amendment which the Committee on the Judiciary will offer is to lines 20 and 23 on page 7 of the committee amendment to the bill, and the amendment will be a motion to strike said lines 20 to 23, both inclusive, therefrom.

"This particular section which the committee will seek to strike out is designated as subsection (5) on page 7, and is what is commonly called the basing-point provision." (80 Congressional Record, pp. 8139, 8140)

Reference is also made to statements of Representative Crawford in the Congressional Record at pages 8126, 8127, and Representative Citron in the Congressional Record at pages 8223, 8224.

The intention of Congress that basing point prices would not be unlawful under Section 2(a) as amended is confirmed by the fact that other bills have been introduced from time to time, including bills sponsored by the Federal Trade Commission, which would specifically prohibit basing point prices, and that none of these bills has become law.

Thus, in 1936, there was pending in the Senate S. 4055 (and a counterpart in the House, H. R. 10385), which was expressly aimed at eliminating the basing point. Hearings on this bill were held before the Senate Committee on Interstate Commerce from March 9 to April 10, 1936, but the bill was never enacted. Another bill to the same effect which never reached enactment was S. 3744.

We submit, therefore, that the decisions below run so counter to the plain intent of the law-making agency that they should be reviewed and reversed by this court.

POINT II.

The decision of the Commission and of the Court below as to the effects of alleged price discrimination upon competition which must be shown in order to establish a violation of Section 2(a) are in conflict with decisions concerning similar language in other sections of the same statute. The matter is one of general concern meriting review.

Under the language of Section 2(a), a violation is not established by merely showing that a seller has charged different prices or, indeed, has discriminated in price. It must also be shown that the effect of the discrimination "may be substantially to lessen competition or tend to create monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers or either of them." Similar language is contained in Sections 3 and 7 of the Clayton Act. It has been held by this Court and by the Circuit Court of Appeals of several of the circuits that the words "may be" in these sections connotes something more than a mere theoretical possibility and that in order to establish a violation the evidence must show reasonable probability of the consequences described. Moreover, importance has been given to the words "substantially lessen competition" because it has been held that competition cannot be substantially lessened unless substantial competition exists.

> *International Shoe Co.* v. *F. T. C.*, 280 U. S. 291 (1930), at p. 298;
>
> *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922), pp. 356-357;
>
> *A. E. Staley Mfg. Co.* v. *Federal Trade Commission*, 135 F. (2d) 453 (C. C. A. 7th, May 10, 1943);

Standard Oil Co. v. *F. T. C.*, 282 Fed. 81 (C. C. A. 3rd, 1922), pp. 86-87;

Pennsylvania Railroad Co. v. *I. C. C.*, 66 F. (2d) 37 (C. C. A. 3rd, 1933);

Temple Anthracite Coal Co. v. *F. T. C.*, 51 F. (2d) 656 (C. C. A. 3rd, 1931);

Vivaudou, Inc. v. *F. T. C.*, 54 F. (2d) 273 (C. C. A. 2nd, 1931);

United States v. *Republic Steel Corporation*, 11 F. Supp. 117 (D. C., N. D. Ohio, 1935).

In the *Standard Fashion Co.* case, this Court said (pp. 356-357):

> "* * * But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed *probably* lessen competition, *or create an actual tendency* to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial." (Italics ours.)

Citing that case, Judge Woolley, speaking for the Court in *Standard Oil Co.* v. *Federal Trade Commission*, said (at p. 86):

> "* * * To make clear the principle upon which we shall examine the testimony and decide these cases, it may be well to observe that the Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not wait for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipiency and stop their growth. Yet, in thus avoiding an objectionable effect by removing the cause, the *Congress did not intend the statute to reach every remote lessening of competition or every dim and uncertain tendency to monopoly. It intended rather*

that the Commission, and ultimately the courts, *should inquire not whether a given practice* may possibly lessen competition or possibly create a monopoly, but whether it *probably lessens competition—and lessens it substantially—and whether it actually tends to create a monopoly.*" (Italics ours.)

In *International Shoe Company* v. *Federal Trade Commission,* this Court said (at p. 298):

> "Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 357; that is to say, to such a degree as will injuriously affect the public. Obviously, such acquisition *will not produce the forbidden result if there be no pre-existing substantial competition to be affected; for the public interest is not concerned in the lessening of competition, which, to begin with, is itself without real substance.*" (Italics ours.)

The decision of the Commission and of the court below are plainly at variance with the foregoing decisions and would give to the language of Section 2(a) a wholly different effect from that attributed to similar language in the cases cited.

Thus the Commission called no witnesses as to price differences resulting from the basing point pricing system, and offered no evidence as to the effect of these differences upon competition. All that the record contains on the point is a stipulation entered into between counsel for the Commission and counsel for petitioners. The Commission did not, and on the record could not, find that the basing point pricing method tended to a monopoly in petitioners themselves. The Commission's findings on this point were directed solely to the effect of the pricing method on the competitive ability of candy manufacturers purchasing from petitioners. The Commission and the court below reached

their conclusions solely by placing interpretations upon the stipulation and drawing inferences therefrom of facts not agreed to by the parties. A fair reading of this stipulation requires that the conclusion be drawn therefrom that there is at least as much likelihood that when shipment is made from Kansas City the fact that petitioners incur a lower freight cost than if shipment had been made from Chicago has no effect upon the ability of a candy manufacturer to compete. Indeed, the very circumstance peculiar to the position of petitioners here that the price to a customer is agreed upon in advance and at that time it may be impossible to tell whether shipment will be made to him from Chicago or from Kansas City makes it obvious that the point of actual shipment and the freight rate therefrom can have no effect upon the buyer's competitive ability.

With respect to the extensions of time to book orders and to take delivery and the sale of glucose in tank-car lots to tank-wagon buyers, there is neither a stipulation nor a scintilla of evidence as to the effect of these practices upon competition with or the competitive ability of either petitioners or their customers. The decisions below, therefore, in effect, represent holdings that the language of this portion of Section 2(a) may be disregarded, a decision which certainly merits review.

In the case of the allowances or discounts to buyers of feed and to certain purchasers of starch, there was no evidence and only a stipulation as to the effect of these allowances or discounts on competition. The stipulation in each instance was that the discounts or allowances might give to each of the recipients a competitive advantage if used to reduce its sales price, but there was not a word in the stipulations and not a scintilla of proof that the discounts or allowances were ever so used. For all that the record discloses, the discounts may have been distributed as increased profits to the stockholders, or may have been absorbed by additional manufacturing or other costs. Certainly there was no showing of any reasonable probability of a tendency to monopoly or elimination of competition.

Finally, as to all of the situations dealt with, there is not a word either by way of testimony or stipulation that any purchaser from petitioners who was the beneficiary of a supposed discrimination knew that he was being favored. Therefore, in finding violations, the Commission in effect struck from the statute the words "knowingly receives the benefit of such discrimination". The decision of the lower court upholding this action should be reviewed.

POINT III.

The decisions below should be reviewed because the action of the Commission was arbitrary and in disregard of uncontradicted evidence.

Under the statute, price discrimination compelled by the necessity of meeting competition is excused. There was uncontradicted evidence that petitioners' practices in extending the times for customers to book orders and take deliveries and in selling in tank-car quantities to buyers customarily purchasing only in tank-wagon lots were undertaken by petitioners to meet competition and because similar practices had already been indulged in by petitioners' competitors. This evidence was ignored, although in the *Staley* case the court below set aside the Commission's order in a finding that the corn industry was highly competitive and that Staley made its delivered prices by the basing point method because that method was in effect in the corn industry and Staley adopted it to meet competition. Furthermore, the Staley Company was one of petitioners' competitors. If the Staley Company was excused because of competitive conditions, it would seem inevitable that its competitors should be similarly excused.

POINT IV.

The decisions below with respect to the Curtiss transaction do violence to the language of Section 2(e). Questions of statutory interpretation are involved which are of general interest to manufacturers and should be passed upon by this Court.

A. Whether a Commodity Purchased and Used as an Inseparable Ingredient of a Totally Different Manufactured Article is "a commodity bought for resale, with or without processing" Within the Meaning of Section 2(e) is an Issue of General Concern to Manufacturers.

Section 2(e) prohibits discrimination through the furnishing of services or facilities in favor of one purchaser as against another "of a commodity bought for resale, with or without processing." The commodity in question here was dextrose (refined corn sugar). It was bought by the Curtiss Candy Company and used by it solely as an ingredient in candies. When candy is made, the dextrose therein cannot be separated or distinguished without chemical analysis. The Curtiss Candy Company does not sell dextrose and did not buy dextrose to resell it as re processed dextrose. The purchasers of the candy did not buy it as "dextrose" or "processed dextrose". To hold, as did the Commission and the court below, that under these circumstances dextrose purchased by the Curtiss Candy Company comes within the language of the statute is to hold that every article that goes into a manufacturing process from which wholly different products result is an article bought for resale within the language of the statute. The decision, therefore, would affect the entire manufacturing business of the whole country in which ingredients are united to combine in a different article. We submit that such a decision is so plainly erroneous and far-reaching that it should be reviewed.

B. This Court Should Consider Whether an Arrangement Whereby a Buyer and a Seller Cooperatively Advertise Their Respective Products Represents a Service or Facility Within the Meaning of Section 2(e).

Under the arrangement between petitioners and Curtiss, Curtiss was not obligated to buy any dextrose or corn syrup from petitioners. Each desired to advertise its own products and to expand its field of advertising by the cooperative arrangement. The arrangement is one which obviously would be appropriate and appeal to many industries. We submit that it was error to hold that such an arrangement was prohibited by Section 2(e). Nor was the advertisement by petitioners a "service or facility" supplied by them to Curtiss. It was motivated purely by self-interest on the part of petitioners in promoting their own product, *i. e.*, dextrose. They were not interested in promoting the sale of Curtiss candies except in so far as they were advertised as containing dextrose. Furthermore, Curtiss' advertising of its candies as "rich in dextrose" was of great benefit to petitioners. Since Curtiss' advertising was twice the volume of petitioners', it would appear that petitioners rather than Curtiss gained by the arrangement.

C. The Decisions Below were in Error in Holding that Petitioners Discriminated Within the Intention of Section 2(e).

There was no evidence that any candy manufacturer had desired to enter into an arrangement with petitioners similar to that entered into with Curtiss. Obviously, therefore, there was no evidence that any candy manufacturer had been refused such an arrangement. Consequently, these decisions would give to Section 2(e) the effect that a seller may not enter into such an arrangement with one buyer unless he persuades all other buyers, whether they want to

do so or not, to make similar arrangements with him. Plainly, this cannot be the law.

Moreover, petitioners were buying nationwide advertising. The record shows that Curtiss was one of few with whom a cooperative arrangement for such advertising could be made. The only other company mentioned that advertised on a comparable scale and therefore would be in a position to offer to petitioners similar benefits of such an arrangement was the Mars Candy Company, which petitioners approached but which declined to enter into the arrangement.

We submit that there can be no discrimination unless it appears that parties similarly situated, capable of entering into similar arrangements and desiring to do so, have been refused.

Conclusion

Without discussing further the other points raised by the petition, we submit that the considerations discussed herein afford substantial justification for the petition and warrant the review prayed for therein.

Respectfully submitted,

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